

Exhibit 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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LORI SANBORN : No. 3:14CV-1731 (SRU)
 : 915 Lafayette Boulevard
 vs. : Bridgeport, Connecticut
 :
 : April 1, 2015
 VIRIDIAN ENERGY, INC. :
 - - - - - x

MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

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1 (2:15 O'CLOCK, P. M.)

2 THE COURT: Good afternoon. We're here in the
3 matter of Sanborn v. Viridian Energy, Inc. Could I have
4 appearances, please?

5 MR. IZARD: Good afternoon, Your Honor. Robert
6 Izard and Seth Klein for the plaintiffs.

7 THE COURT: Thank you.

8 MR. BLYNN: Dan Blynn and Shahin Rothermel from
9 Venable on behalf of Viridian Energy. And with us is Adam
10 Burns, In-house Counsel for Viridian.

11 THE COURT: Very good. Okay. We're here on the
12 motion to dismiss, which I've reviewed, and perhaps I'll
13 just let you do a traditional argument. Sometimes I start
14 with questions but feel free to get started, if you like.
15 Mr. Blynn.

16 MR. BLYNN: Thank you, Your Honor.

17 May it please the Court, Your Honor, this case
18 is the quintessential square peg, round hole. Plaintiff
19 tries to jam Viridian's express claims about its variable
20 rate into a fourth complaint that's been filed in three
21 other cases pending before this Court, which alleges that
22 Viridian represents that its rate is exclusively and
23 rigidly tied to the wholesale market rate for electricity.

24 Plaintiff plays fast and loose with Viridian's
25 actual statements. None of the documents that form the

1 basis for this case even reference a wholesale market
2 rate; rather, they clearly explain that Viridian's rate
3 can change from month month for any number of reasons,
4 including market conditions, Viridian's operating costs
5 and there is a catch-all of other factors, and that that
6 rate can be higher or lower than the utilities in any
7 given month. Just --

8 THE COURT: Let me press you a little bit on
9 that.

10 MR. BLYNN: Sure.

11 THE COURT: It seems to me there are two
12 statements that you're referring to now. One is found in
13 the terms and conditions sheet, which says, quote, "Your
14 price may fluctuate from month to month based on wholesale
15 market conditions applicable to the DC's service
16 territory." So, based on wholesale market conditions.

17 The other statement is a little more broad and
18 it basically says a variety of factors, including the
19 wholesale market.

20 So, you're not suggesting that the second
21 statement somehow cures the first?

22 MR. BLYNN: I think it elaborates the first,
23 Your Honor. Both documents, the first statement comes
24 from a contract -- well, what's called, what's referred to
25 by the parties as a contract. The second comes from the

1 Massachusetts terms and conditions of service, which is
2 really a disclosure statement. Both documents are
3 provided to you -- to the plaintiff and every other
4 Viridian customer.

5 THE COURT: Right. So I'm looking at the terms
6 and conditions sheet. What I've got is a statement that
7 says, that says the product is going to be based on
8 wholesale market conditions, so I have an allegation that
9 that's not in fact what happened and it was known that
10 that wasn't going to happen. Why isn't that unfair?

11 MR. BLYNN: That allegation, Your Honor, to be
12 very clear, is the wholesale market rate, and it's an
13 important distinction because that is why this case is
14 different than Chen, and similar to the Slack case, which
15 has been briefed extensively in the papers.

16 In Chen, Your Honor, the contractual term, the
17 representation at issue was that the variable rate would
18 reflect the wholesale cost of electricity. And in that
19 complaint, the plaintiff said, in fact, the defendant is
20 not -- its variable rate is not based on the wholesale
21 cost of electricity.

22 Here, Viridian says our rate is based on
23 wholesale market conditions, a very broad topic that
24 includes, possibly includes market rates, prices in the
25 wholesale market and any number of other, other items.

1 THE COURT: What else could it -- I mean what
2 else would a reasonable consumer understand the term
3 "wholesale market conditions" means other than the
4 wholesale market rate?

5 MR. BLYNN: Well, I think it means, you know,
6 any number of conditions in the marketplace. It means
7 what's going on with the extreme weather, what's going on
8 --

9 THE COURT: But how would that affect -- you
10 mention that a couple times in your brief. I didn't
11 understand how extreme weather has any bearing on
12 wholesale market conditions or rate.

13 MR. BLYNN: Well, Your Honor, the reason it has
14 a bearing is because when, during the -- let's take the
15 polar vortex back in the beginning of 2014 -- that forced
16 a number of generators offline, generators shut down,
17 there was a constraint on the ability to get electricity.

18 THE COURT: And so the price goes up.

19 MR. BLYNN: The price goes up and there's a host
20 of other costs that go into Viridian's rate. This isn't
21 simply a pass-through. There are renewable energy
22 credits, there are ancillary costs, operating costs,
23 capacity costs and so on and so forth.

24 THE COURT: But your typical residential
25 electric consumer reads this -- it's plausible, isn't it,

1 that they read "based on wholesale market conditions" to
2 mean based upon wholesale market price, that is, the price
3 that Viridian's having to pay to get the energy that it's
4 been supplying?

5 MR. BLYNN: But, respectfully, Your Honor, I
6 don't think it is plausible. I think that that is a
7 somewhat -- it's not a tortured reading but it's not a
8 straight understanding of what the market condition is.
9 "Condition" is a very broad idea. A market rate is a very
10 specific component of an overall price.

11 THE COURT: Well, I have to look at it in a
12 light most favorable to the plaintiff and draw all
13 reasonable inferences. Isn't it -- you're saying it's an
14 unreasonable inference to say that wholesale market
15 conditions means principally wholesale market rate.

16 MR. BLYNN: I think it's unreasonable and I
17 think that the Court in Clouston found it unreasonable.
18 When you have a written document --

19 THE COURT: Right.

20 MR. BLYNN: Plaintiff can't take that document
21 and claim that it says something other than what it says.
22 In that case, that would be an unreasonable
23 interpretation.

24 THE COURT: So, in your reading it's impossible
25 for Viridian to violate this contract, regardless of what

1 its price is, because no one can figure out what is meant
2 by "wholesale market conditions." That could include
3 anything they decide it means.

4 MR. BLYNN: Your Honor, the District of New
5 Jersey in a strikingly similar case involving very similar
6 language, has said yes, it is unreasonable. There's no
7 unfairness claim when you say based upon market
8 fluctuations and other factors. That gives discretion to
9 a propane supplier to set the price as it pleases.

10 And the facts in that case, this is the Slack
11 case, were very egregious, Your Honor. There, the
12 contract did not explain how a price was set, the
13 methodology, and in fact, the defendant wouldn't even
14 provide that price to consumers until after they already
15 received their propane supply.

16 So, in both Slack and Faistl, the Court, the
17 Court in the District of New Jersey, found no unfairness
18 claim and no deception claim; indeed, no claim under the
19 consumer protection statute of that state, which was New
20 Jersey, could lie. This case squares with both of those
21 cases. Where it doesn't -- go.

22 THE COURT: Well, the question is whether those
23 cases are persuasive; they are not controlling.

24 MR. BLYNN: They are not controlling, Your
25 Honor, but the reasoning is very detailed and in my

1 opinion, very persuasive. And especially when you look at
2 the contractual language involved in those cases, this is
3 why this case is incredibly different from Chen.

4 In Chen, it really tied the allegations in the
5 complaint, matched the contractual language. There's no
6 implied claim here, Your Honor. They haven't alleged that
7 Viridian implied by saying wholesale market conditions,
8 there's a replied representation of wholesale market
9 rates. In fact, "implied" only comes up twice in the
10 complaint and that's in the breach of the implied covenant
11 claim.

12 THE COURT: Well, they don't have to come out
13 and say it's alleged. They can make an allegation about
14 what the representation was and say that it was false. In
15 other words, it all comes down to whether, based on
16 wholesale market conditions, there's a reasonable
17 inference that that means based on wholesale market rate
18 or price, and I guess, you know, we disagree about that
19 one.

20 MR. BLYNN: I suppose, Your Honor, and
21 unfortunately I think I'm going to be on the losing side
22 of that disagreement -- but, Your Honor, I will say that
23 these very similar facts have been evaluated in very
24 detailed decisions by the District of New Jersey, not
25 binding but very persuasive in my opinion.

1 But, regardless, there are other problems with
2 their CUTPA and MCPA claims. Let's deal with some of the
3 low hanging fruit, I guess, immediately and hopefully this
4 can help explain why neither claim should survive
5 dismissal.

6 The CUTPA claim, one of the essential elements
7 that the deceptive or unfair conduct had occurred in this
8 case, within Connecticut.

9 THE COURT: That is alleged.

10 MR. BLYNN: I'm sorry?

11 THE COURT: That's been alleged.

12 MR. BLYNN: I haven't seen it, Your Honor. We
13 have a Massachusetts plaintiff.

14 THE COURT: Right.

15 MR. BLYNN: And she brings a CUTPA claim on her
16 own behalf and on behalf of a class.

17 THE COURT: Well, she's bringing it on behalf of
18 the class of folks who have Connecticut residence, who are
19 serviced by Viridian in Connecticut.

20 MR. BLYNN: I think it would be a different
21 story if there was a plaintiff from Connecticut who
22 receive service here.

23 THE COURT: Well, it would be a different story,
24 we wouldn't have this argument, but the question is
25 whether the case gets dismissed because of that, and it

1 seems to me there's a couple of approaches.

2 One is she's making, she's making a claim as a
3 class representative to represent those people who are
4 Viridian customers who are subject to this in both
5 Massachusetts and in Connecticut. And the law that would
6 apply to the folks in Massachusetts and the law that would
7 apply to the folks in Connecticut may well be different.
8 And so you'd have two subclasses, a Connecticut subclass
9 and a Massachusetts subclass.

10 But why would I dismiss this claim? I mean,
11 worst case scenario would be tell the plaintiff, maybe you
12 should come up with a Connecticut named plaintiff, but in
13 the meantime, it doesn't seem appropriate to dismiss just
14 because she individually can't bring a CUTPA claim.

15 MR. BLYNN: Well, actually this issue has
16 squarely been addressed by the Connecticut Court of
17 Appeals in Western Dermatology. In that case -- which was
18 cited in both our moving brief and ur reply brief but not
19 addressed in the opposition brief -- in that case you had
20 a New Mexico plaintiff who alleged that a Delaware
21 corporation with its principal place of business in
22 Connecticut, misrepresented certain attributes of its
23 software product, and the Connecticut Court of Appeals
24 said, no, you can't have a CUTPA claim in that situation.
25 It just doesn't lie.

1 And the Country Club v. Shaw's Supermarket case
2 is similar.

3 THE COURT: Class actions.

4 MR. BLYNN: I can't recall, Your Honor.

5 THE COURT: I can't recall either but I doubt
6 it. In other words, sure, somebody from New Mexico sues
7 under CUTPA, I get that, but here we have a suit brought
8 on behalf of thousands of people.

9 MR. BLYNN: The Hydroxycut litigation, the MDL
10 that I handled at my former firm, in that case, Your
11 Honor, it was cited, it was cited by the plaintiffs in
12 their opposition brief and addressed an earl decision from
13 that same MDL was addressed in our reply brief.

14 In the decision we cite, Judge Moskowitz said
15 you can't state a claim -- in that case, the New York
16 general business law -- you can't state, a plaintiff can't
17 state a claim under the New York general business law on
18 behalf of, on the behalf of a theoretical class of New
19 York consumers without there being a named plaintiff in
20 that case.

21 Now, in the Hydroxycut decision the next year,
22 that's cited by the plaintiff, Judge Moskowitz didn't --
23 simply noted that there is a disagreement among the courts
24 whether or not you can in fact do that. In case the judge
25 said, yeah, I'm going to let this get through a motion to

1 dismiss, but that was in 2011, I believe.

2 Since then the Western Dermatology case came
3 out, 2013, where the Connecticut Court of Appeals squarely
4 addressed this issue.

5 THE COURT: Right, but why is the remedy for any
6 problem here not a direction to the plaintiff, you have 45
7 days within which to move to amend to add a Connecticut
8 plaintiff?

9 MR. BLYNN: And maybe that is the remedy, Your
10 Honor, but that, that deals with a, with a theoretical
11 complaint that could be alleged later. It's not the
12 complaint that we're dealing with now.

13 THE COURT: Well, it is the complaint, it's not
14 the same plaintiff.

15 MR. BLYNN: Okay.

16 THE COURT: In other words, if another plaintiff
17 gets added, it's exactly the same operative document and
18 that would cure the problem, right?

19 MR. BLYNN: It might, Your Honor.

20 THE COURT: All right. I'll ask Mr. Izard about
21 that.

22 MR. BLYNN: And I suspect they have a
23 Connecticut plaintiff or two already lined up.

24 THE COURT: I wouldn't be surprised.

25 MR. BLYNN: The MCPA claim also is easily

1 dismissible because the pre-suit notification that is a
2 required element to state an MCPA claim wasn't made.

3 THE COURT: Now, the opposition to that says the
4 statute only requires it when there's no -- when there's a
5 Massachusetts corporation or there's assets in
6 Massachusetts.

7 MR. BLYNN: That's right.

8 THE COURT: Okay.

9 MR. BLYNN: And they haven't alleged that, they
10 aren't alleged that there's -- what they try and do is
11 they try to shift the burden to Viridian to say that, to
12 prove that they are not, that, that the plaintiff is not
13 exempt from this notice requirement. They could have
14 alleged upon information and belief.

15 And, in fact, Your Honor, having a governmental
16 license is an asset within the state. Viridian operates
17 within Connecticut. It has a license to operate so it
18 clearly has some asset. Doesn't excuse the failure to
19 provide a pre-suit notice. And the pre-suit notice is --

20 THE COURT: So, your argument is any corporation
21 that is authorized to do business in Massachusetts has an
22 asset in the state? I don't think that's the plain
23 reading of the statute.

24 MR. BLYNN: Your Honor, I think --

25 THE COURT: Otherwise, they would just say that

1 requirement applies to any corporation authorized to do
2 business in the state.

3 MR. BLYNN: Your Honor, I think the -- first of
4 all, I think the Supreme Court in Lambert Timber v.
5 Lambert (ph), a 1985 case, did find that a license is an
6 asset.

7 But, regardless, you know, the pre-suit notice,
8 even if they were confused or questioned whether it was
9 even required, it's easy to send and it's an important,
10 it's an important step in an MCPA litigation. It allows
11 the defendant to investigate that individual plaintiff's
12 claim and settle without being forced into a class action.

13 It's an important step that wasn't followed
14 here, Your Honor, and it's an essential element that must
15 be pled and proved. They haven't pled it and they haven't
16 pled that they are exempt. It was raised in an opposition
17 brief which isn't in the complaint.

18 THE COURT: So you want the complaint amended to
19 indicate specifically that they are exempt from your
20 requirement?

21 MR. BLYNN: I think, I think they either need to
22 provide the pre-suit notice or, yeah, amend the complaint.

23 But there are a host of other reasons to dismiss
24 the CUTPA and MCPA claims, and they've been detailed
25 extensively. The unfairness claim, they are missing an

1 essential element in their complaint. There are three
2 levels to an unfairness claim: Immoral, oppressive,
3 unethical conduct, substantial injury, as well as, as well
4 as that the challenged practice offends public policy.
5 There's no allegation of offensive public -- that the
6 challenged practice offends public policy. That's raised
7 in their opposition brief which, again, is not the
8 complaint.

9 But beyond that, again, the Faistl and Slack
10 courts found no unfairness claim can lie when you have a
11 contract that's very similar to Viridian's, which provides
12 the supplier discretion to set its price based on market
13 conditions or other factors.

14 And, Your Honor, as we noted in our reply brief,
15 when you parse through and read the unfairness allegation
16 carefully, it's really one rooted in deception and
17 falsity. Indeed, in the reply brief they even say, the
18 plaintiff even argues that it's defendant's
19 misrepresentations which caused the unfairness.

20 That's not an unfairness claim, that's a
21 deception claim. And deception claims have to satisfy
22 Rule 9(b) which hasn't even remotely been satisfied here.

23 THE COURT: Well, help me understand that
24 argument, because not only do you know the precise
25 statement that is claimed to be deceptive, you provided it

1 as an attachment to your brief.

2 This is not a situation where there's a vague
3 "they made false statements to us and we relied upon
4 them," you attached the terms and conditions to your brief
5 and we've been talking about the statement that's at
6 issue, so what more do you need under Rule 9(b)?

7 MR. BLYNN: I think we need to know Ms. Sanborn
8 saw those statements. If she didn't see them before she
9 enrolled with Viridian, then she couldn't have relied upon
10 them and the deception claims fail.

11 THE COURT: Right, but that's not a 9(b) issue.
12 That is an issue on the merits, that she didn't rely on
13 them and she doesn't have a claim.

14 MR. BLYNN: But it is a Rule 9(b) argument
15 because the "when" is important here. And also, Your
16 Honor, besides those two contracts, the two documents we
17 attach to our motion to dismiss, she's also alleged some
18 sort of phantom marketing materials that she's -- that
19 where these representations were made as well, and there's
20 nothing in the complaint addressing any marketing
21 materials other than one reference to marketing materials.
22 That's also a real problem. It puts us -- we're, Viridian
23 is charged with defending this case and responding to
24 these allegations and it has no direction.

25 THE COURT: Okay, well, there's two different

1 issues here. One is whether the complaint gets dismissed,
2 and the second is whether the complaint is perfect.

3 And it seems to me that you're saying we need
4 more detail on the marketing effort to actually make this
5 claim, and I think that it's a fair argument. But the
6 question whether the complaint gets dismissed is does it
7 satisfy 9(b) and it's pretty hard to say it doesn't
8 satisfy 9(b) when you provided the very statement they are
9 relying on, or at least some of them.

10 MR. BLYNN: Right, but there's more to it than
11 the when and where they occurred, it's the explanation of
12 how these statements are deceptive. As I said, the
13 complaint focuses on this concept of this wholesale market
14 rate or this allegation of wholesale market rate, but
15 that's not what Viridian represented.

16 THE COURT: Well, it says -- again, we're going
17 back to the same argument --

18 MR. BLYNN: Right.

19 THE COURT: Wholesale market conditions. I
20 think a reasonable consumer is going to read that and
21 think, oh, if the wholesale market goes down, my rate is
22 going to go down, too. And it it doesn't, and it's been
23 clearly alleged that it didn't, that seems deceptive and
24 unfair.

25 MR. BLYNN: Again, Your Honor, I point to

1 Clouston where this Court says where you have an expressed
2 written statement, it's unreasonable for a consumer to
3 interpret that beyond the specific terms of that
4 statement.

5 And so, when you have market conditions,
6 wholesale market conditions, and then another document
7 that elaborates wholesale market conditions, operating
8 costs and other factors, you can't, you can't construe
9 it -- it's patently unreasonable to say wholesale market
10 rate.

11 THE COURT: Well, we just disagree about that.
12 I think that's the crux of the case or crux of this
13 motion. I think we just disagree about that.

14 MR. BLYNN: Turning quickly to the unjust
15 enrichment claim, there's not been a single variable rate
16 case where one of these, an unjust enrichment claim has
17 not been dismissed with prejudice or without prejudice.

18 The problem here is there's clearly a valid
19 contract. Plaintiff has alleged a valid contract. When
20 you have a valid contract, you can't have unjust
21 enrichment. It can only be pled in the alternative when
22 the question of the validity of the contract is at issue
23 and that's clearly not here.

24 And so, Your Honor -- and not to mention for
25 unjust enrichment, Viridian must have been unjustly

1 enriched. The plaintiff received the electricity service
2 she contracted for. There's no enrichment. She paid the
3 money and received the electricity, so --

4 THE COURT: Well, I think your first argument is
5 better than your second, because if you take her
6 allegations as true, she was overcharged and an overcharge
7 is an unjust enrichment, so it seems to me the plaintiff
8 probably has a problem with the first argument.

9 MR. BLYNN: And then, Your Honor, the final
10 cause of action alleged in this case is the breach of the
11 implied Covenant of Good Faith and Fair Dealing and, Your
12 Honor, there are two elements really to that claim.

13 The first is that the plaintiff must show or
14 allege that she had a right to receive benefits that was
15 impeded by the defendant and that Viridian acted in bad
16 faith. And this is really important. Bad faith, Your
17 Honor, is a very high standard, it's a sinister motive or
18 dishonest purpose. And both the Court in Hoffnagle, the
19 Connecticut Superior Court, that's the case cited by the
20 plaintiff in her opposition brief, and the Faistl Court,
21 both warn that courts should not construe breach of
22 implied covenant claims too broadly or bad faith too
23 broadly. And in Hoffnagle, the Court even made clear that
24 beach of implied covenant should not be a catch-all cause
25 of action.

1 "The mere disagreement in contractual
2 interpretation isn't bad faith," and that comes from the
3 19 Perry Street case. It's a Connecticut Supreme Court
4 case, also cited in the opposition brief.

5 Here, the plaintiff received the benefits, she
6 got the 100 percent green energy, this premium product she
7 selected. She's claimed that the bad faith, the bad faith
8 is Viridian's goal of maximizing its profits or allegedly
9 overcharging. But maximizing profit is not, as a matter
10 of law, is not bad faith. And the Hoffnagle Court and
11 Faistl all have said that.

12 And finally, Your Honor, the Connecticut Supreme
13 Court just in two years in the Capstone case, Capstone
14 Building Corporation v. American Motorist Insurance, held
15 that "Where a contract vests discretion in a party, that
16 party exercises its discretion, it can't be bad faith."

17 THE COURT: Right. The problem is it vests it
18 in one place and not in another, and so the question is do
19 you indefinitely win under those circumstances.

20 MR. BLYNN: We do. It squares completely with
21 Capstone where the contract vested 100 percent discretion
22 in the insurance company to investigate whether or not --

23 THE COURT: Right.

24 MR. BLYNN: -- an insurance claim could be made.
25 And they decided not to.

1 THE COURT: So you're saying the Viridian
2 contract says Viridian can charge whatever it wants to
3 charge. It has 100 percent discretion to charge as much
4 as it wants to for its energy.

5 MR. BLYNN: Well, as long as its tied to market
6 conditions, as long as there's some bearing on market and
7 wholesale market conditions in its operating costs or in
8 some other factors. I mean that's exactly where Faistl
9 and Slack came out.

10 THE COURT: Okay. All right, thank you.

11 MR. BLYNN: Thank you, Your Honor.

12 THE COURT: Mr. Iizard?

13 MR. IZARD: Yes, thank you, Your Honor.

14 Your Honor, if I might just hand up two
15 documents, I've already provided to counsel. One is just
16 a copy of the chart in the complaint regarding the
17 movement of price, and the second is the document -- this
18 is the report of independent system operator of New
19 England; it's cited in footnote four of defendant's reply
20 brief. They have a web cite to it, and I just printed it
21 out. So if I might approach Your Honor?

22 THE COURT: Sure.

23 (Hands Court.)

24 THE COURT: So, why don't you have a Connecticut
25 plaintiff here?

1 MR. IZARD: We actually have retainer agreements
2 signed with three and we are prepared to amend. We didn't
3 want to amend right now before this hearing, but we can
4 very quickly after today. And we thought to the extent
5 that the Court had other issues that it thought we should
6 address, we would do that simultaneously.

7 THE COURT: Okay.

8 MR. IZARD: Your Honor, I'd like to talk briefly
9 about the market condition issue, because that's, as you
10 pointed out, Your Honor, the question is the contract ties
11 the rate to either wholesale market conditions or market
12 conditions. And really this case is on all fours with the
13 Yang Chen case, because if you look at the contract in
14 Chen, it talks about the rate reflecting the wholesale
15 costs of electricity, and then it lists a lot of related
16 costs and then it talks about other transmission and
17 distribution charges, and then it says "other
18 market-related factors." That, to me, sounds a lot like
19 market conditions.

20 And I think the real question here is when
21 you're looking at variable rate contract, what market
22 conditions could change which could affect the price of
23 retail power, and the only material factor that could
24 change is the wholesale cost of electricity. And the
25 independent system operator report clarifies that, at

1 least with respect to the power side of the equation.

2 And just to give you a little background, this
3 is described in the report, but ISO New England is
4 basically the nonprofit entity that both operates the grid
5 and it operates the market and the market is reviewed by
6 FERC, the Federal Energy Regulatory Commission, to make
7 sure it's competitive and fair, and that's discussed a
8 little bit more on page one.

9 But if you go to page 16 of the report, you can
10 see the price structure in Connecticut. There's a chart
11 up there, and that's in megawatt hours so to convert to
12 kilowatt hours, you would have to divide it by a thousand.
13 But the top line is the total wholesale rates. That would
14 include capacity and the ancillary costs that the
15 defendant referenced in the reply brief.

16 The second next line is the pure energy costs,
17 and we didn't actually have this document when we filed
18 our complaint so we could tweak it. The second is the
19 energy cost, and that's the at graph and the information
20 related to in our complaint, and then the last items are
21 the types of costs that the defendant references in their
22 reply.

23 For example, capacity. The capacity charges
24 that it's allocated among all market participants to make
25 sure that the grid is built up, that there's transmission

1 wires and all that sort of stuff going into the future.

2 The ancillary charges that defendant references
3 is basically the charge to keep a plant running when it
4 was not operating full capacity.

5 And then if you look across this grid, you'll
6 see that the, by far the biggest charge is the energy
7 cost, and more importantly, it's really the only variable
8 charged, so that's the only thing that could effect
9 changes in prices.

10 You look at February 2014, the total cost is --
11 this would be in megawatt hours -- is 158-dollars. The
12 energy charge is 150-dollars. All the other charges are
13 only \$7.33.

14 If you go to this lowest charge, which is in
15 August 2014, the total charge is 37.55. The energy charge
16 is 30.44 and all the other charges are only 7.11. So
17 basically the only thing that can cause variability is the
18 wholesale cost of electricity.

19 And so, when we look at what a reasonable person
20 would expect, even if they know a lot about the
21 electricity market, their expectation is that the thing
22 that can drive their rate up and down would be the
23 wholesale price of electricity, because that's the only
24 thing that really varies.

25 And if you look at the orange line on the chart,

1 that is also a market-based rate. We have that listed as
2 the CL&P rate, but the way that the CL&P rate is worked
3 out is it's a fixed rate for either six or twelve months,
4 so basically the utility bears all of the risk of
5 variability in the price, but the way that price is
6 determined is by the market.

7 So, an entity like CL&P will get bids from the
8 market as to what is the cost for delivery of power over
9 six or twelve months. That price structure is approved by
10 the regulators but that's a no risk rate to a consumer.

11 So basically if the consumer wants to bear the
12 risk of price variability, they get something like the
13 orange line. If they want to transfer the risk to the
14 supplier of electricity, they get something like the
15 yellow line.

16 What's fraud about this case is Viridian is the
17 green line, so with Viridian they are transferring all the
18 risk to the consumer, yet their rate is sky high relevant
19 to the no risk rate, relevant to the wholesale rate,
20 relevant to any reasonable metric existing anywhere.

21 So that's really the basis of our claim that
22 their rate is not tied to wholesale market conditions or
23 anything else.

24 And if you look at paragraph 33 of our
25 complaint, you know, we talk about what their other costs

1 could be. They've got to pay for rent. They've got to
2 pay for computers. There's nothing in there that could
3 vary significantly. So we think at least for purposes,
4 especially for purposes of reasonable inferences under
5 12(b)6, we've met the standard we need to meet.

6 As to the unfairness issue on a CUTPA claim,
7 now -- and this really ties to the 9(b) argument, too --
8 as we noted in our brief under Connecticut law there must
9 be disclosure in the contract in advance as to the
10 circumstances under which the contract will change, and
11 that has to be provided to the customer.

12 So, if the customer never got the contract,
13 there's an admission of an unfair trade practice. So I
14 doubt that argument is going to hold up for very long.
15 And the same is true in Massachusetts. And we cited in
16 our brief 220 CMR 11.064a, which talks about the terms of
17 service have to be given to the customer before the
18 service begins.

19 We didn't cite another CMR to the Court but I
20 would like to reference it now. It's 220 CMR 11.063a and
21 that says the terms of service referenced in 4a must state
22 an explanation of price variability and price level
23 adjustments that can cause price to vary.

24 So we think that these contracts fail to do
25 that, which is by definition an unfair trade practice.

1 THE COURT: So what you're really saying is this
2 is what amounts to a fraudulent inducement situation, that
3 Viridian customers were wrongfully induced to sign up with
4 Viridian based upon representations based upon how the
5 rate would be calculated.

6 MR. IZARD: I think that's one aspect of it, but
7 I think there's much more because we have a contract term
8 here, and in our view it's also a breach of a contract.
9 We're viewing the contract to be determined under an
10 implied covenant analysis, but when a contract says you've
11 got to calculate your rate based upon wholesale market
12 conditions, and you're not calculating your rate based on
13 wholesale market conditions, that's a contract problem.
14 It's not just a misrepresentation problem.

15 THE COURT: Well, but you haven't made a breach
16 of contract claim.

17 MR. IZARD: Well, our view -- from our
18 perspective, the implied covenant is actually part of the
19 contract, and our view is that the contract gives Viridian
20 some discretion within the parameters of the allegations,
21 within the parameters of the terms of their contract, and
22 that they failed to do that.

23 Now, Yang Chen analyzed it as a breach of
24 express contract issue. Frankly, you know, courts could
25 go either way. We can amend to add an express contract

1 claim as well, but however you want to look at it, whether
2 it's the implied covenant term built into the contract or
3 the words themselves, we have a scenario where the rating
4 is meant to be determined based on wholesale market
5 conditions and it wasn't and that violates the contract.

6 And so we think there is definitely a contract
7 theory here, but obviously under our CUTPA, Massachusetts
8 unfair trade practice claim, we have two problems. We
9 have the unfairness prong because they failed to meet the
10 statutory requirements for explaining how the rates work,
11 and then we have the deceptive prong because we think, as
12 the Court mentioned, they basically lured people into
13 these arrangements by misstating how they were calculating
14 their rates.

15 THE COURT: So, to the extent that you're
16 relying on a wrongful inducement theory, are you relying
17 only on the contract language as being the inducement or
18 are you relying on marketing materials, solicitations done
19 by mail, et cetera? Because if you're doing the latter,
20 then there is a 9(b) issue because nobody knows what
21 you're relying on, so --

22 MR. IZARD: Right. Well, we're for purposes of
23 that, we are -- for purposes of this complaint right now,
24 we're relying on the contract terms. Terms and conditions
25 do need to be provided in advance of providing service.

1 Terms and conditions are on the websites of Viridian. So,
2 as I understand the way that Viridian --

3 THE COURT: Well, let me push you, because we
4 need to understand whether you're relying on marketing
5 materials or not, because if you are, there's a 9(b)
6 problem. If you're not, then you shouldn't be -- you
7 should make it clear what you're relying --

8 MR. IZARD: Right. Our complaint is not relying
9 on marketing materials. We allege that -- we have one
10 sentence in there that's more of a background thing, but
11 we have not alleged any specific marketing material that
12 we believe class members are relying on. So we are
13 relying on contracts, but we do believe that the contracts
14 are a representation because they have to be provided to
15 customers.

16 THE COURT: I understand.

17 MR. IZARD: Okay. As to the -- the other point
18 I'd like to make out is when we look at the implied
19 covenant issue, there are a couple cases -- for example,
20 the Faistl case cited in defendant's brief, I mean the
21 real question and the standard to articulate there is
22 that, was the defendant using its discretion for a reason
23 either inside or outside the contemplated range of
24 activities based on what the parties expected, or was the
25 discretion being used in a way to transfer a risk to the

1 plaintiff that was beyond the risks assumed by the
2 plaintiff. And that really is governed by the language of
3 the contract.

4 Here, we view that the risk and the obligation
5 that a plaintiff is reasonably expected to be assumed is
6 that the risk would be a based on market conditions and
7 that limits the scope of the discretion. When you start
8 to impose rates for reasons beyond market conditions and
9 transfer to the plaintiff a price risk beyond that
10 contemplated by market conditions, that violates the
11 implied covenant.

12 And we really disagree with the defendant's
13 reading of the Capstone case. The Capstone case, that was
14 a bad faith insurance claim case, and the Court said, you
15 know, when you're looking at an insurance claim the issue
16 is whether did the defendant pay or not. You know, the
17 claim there was that, oh, the defendant insurance company
18 didn't do an adequate investigation. And the Court was
19 saying that's not really the issue. I mean, for example,
20 if the insurance company paid 100 percent of the claim, it
21 wouldn't matter whether the insurance company did an
22 investigation or not.

23 Here, the discussion, in our case the discussion
24 is tied to a specific contract term which is setting the
25 market rate. And in that scenario, I think Capstone would

1 say that the discretion -- the implied covenant applies.
2 I mean Capstone says at 308, the implied covenant concerns
3 discretionary application of a contract term.

4 Here, we have a contract term setting the rate
5 based upon marketing conditions, and our argument relates
6 to discretionary application of that term.

7 On the 93(a) issue, you know, we did a search
8 for assets. The license issue was a new one, that we just
9 heard today, but we couldn't find any assets in
10 Massachusetts, we couldn't find a location in
11 Massachusetts, and so we would believe --

12 THE COURT: So are you going to plead the
13 exemption?

14 MR. IZARD: We could plead the exemption.
15 Again, we heard about this license issue today, and a
16 month ago we asked the defendants for any information on
17 assets and received nothing. And if we can't plead the
18 license exemption, the notice exemption, there's case law
19 in Massachusetts that says you can withdraw the claim,
20 serve the notice and refile it a month later.

21 So to me, this kind of seems like a lot to do
22 about nothing. I'm not -- I guess I'll talk to the
23 defendant afterwards and see kind of how big a deal this
24 is, but -- I'm not sure this is moving the case forward,
25 this whole issue.

1 So, if we can't plead the exemption in good
2 faith, we can withdraw and refile if that's what everybody
3 wants to do, but it's not going to effect the case going
4 forward.

5 However, on the unjust enrichment, you know,
6 that's obviously an alternative claim. We believe the
7 other claims are strong.

8 THE COURT: Help me understand how that
9 alternative could possibly ever arise. In other words,
10 for you to have an unjust enrichment claim, you cannot
11 have a contract.

12 MR. IZARD: Right.

13 THE COURT: You haven't alleged that the
14 contract is void or voidable, so how do you get there?

15 MR. IZARD: If the contract is illusory, and we
16 believe the contract would be illusory if there were no
17 parameters at all on defendant's discretion concerning
18 determination of the market rate. If the contract is
19 illusory, then there is no contract and then we would move
20 to an unjust enrichment analysis. That's the sole basis
21 of it.

22 And we cite to Wilson in there about how a
23 contract, if the promise is meaningless and if the
24 defendant can do whatever we want, we would argue that the
25 contract is meaningless and illusory and, therefore, there

1 is no contract.

2 But that is not our main claim and so it's
3 strictly a fall-back and there number of cases that allow
4 this alternative pleadings, depending on how that shakes
5 out.

6 I'm not sure I answered your question.

7 THE COURT: Well, no, I mean, I think that's
8 pretty creative. I don't thinking it necessarily works.
9 It seems to me you've got a contract here, it's not
10 illusory. The question is what does it mean, and your
11 CUTPA good faith claim covers the circumstance you're
12 describing. In other words, it violates an implied
13 covenant of the contract if they have unfettered
14 discretion to set this rate, in effect.

15 MR. IZARD: I agree with that. As I say, that's
16 our principal claim, but if we lose on that one, this is a
17 fall-back basically.

18 THE COURT: Yes, but how are you going to --
19 that's what I was trying to get at. How are you going to
20 lose that claim and still win an unjust enrichment claim?
21 How does that happen?

22 MR. IZARD: Well, I think that if -- I don't
23 think it should happen. I think theoretically, I think
24 that if the Court could conclude that, even with the
25 implied covenant, and even if the Court accepts the

1 defendant's interpretation of Capstone, which I disagree
2 with, and concludes that, you know, there is no limit on
3 discretion at all, then I think the contract becomes
4 illusory. I don't think that's a correct analysis.
5 Again, we want to make sure we cover all the bases.

6 THE COURT: Okay.

7 MR. IZARD: Thank you, Your Honor.

8 THE COURT: Thank you. All right.

9 Mr. Blynn, anything further, quickly?

10 MR. BLYNN: Just quickly, Your Honor, sure.
11 Just a couple quick points.

12 First of all, the Connecticut statute
13 16-245o(f)(2), and then the Massachusetts regulation 940
14 CMR Section 19.04(d), which Mr. Izard mentioned, is in
15 their opposition brief, that expressly requires an energy
16 supplier to disclose the circumstances of the rate. I
17 believe it's the language in the statute, in the
18 regulation perhaps, but certainly in the statute. There's
19 not been a single case decided under that statute, and in
20 another, in another case, Your Honor, involving a similar
21 New York disclosure provision, the Southern District of
22 New York found that, in fact, you just have to disclose,
23 you have to inform the consumer that they have a variable
24 rate. You don't have to explain how the variable rate is
25 set.

1 That is the Wise v. Energy Holdings case. It
2 hasn't been briefed in this case, Your Honor, but I do
3 want to make clear that that case is out there and that
4 issue has been decided, at least under the New York
5 analogue to the Connecticut and Massachusetts regulation,
6 cited.

7 Your Honor mentioned if you have a contract, the
8 question is that, here, the issue is you have a contract
9 but the question is what does it mean. Well, that's
10 exactly what the Connecticut Supreme Court said in 19
11 Perry Street. When you have a mere disagreement in
12 interpretation of a contract, that can't be bad faith.

13 And again, in Capstone, the Supreme Court in
14 2013 said where a contract that is pure discretion with
15 one party, there can't be, it can't be bad faith.

16 Finally, Your Honor, if the contract is
17 illusory, is found to be illusory, and I do think that's
18 an interesting argument, but that would gut their breach
19 of implied covenant claim which can't exist without a
20 valid contract.

21 Finally, Your Honor, just one point about, about
22 the statement Mr. Iizard made about asking for discovery
23 about the assets, averting assets in Connecticut after --

24 THE COURT: Massachusetts.

25 MR. BLYNN: I'm sorry, Massachusetts. After the

1 motion to dismiss is filed, that kind of foreshadows, and
2 you see it throughout the opposition brief, plaintiffs
3 think they can just file some sort of complaint and
4 automatically get to discovery, and it's just not that
5 simple. If it were, you would never have any cases going
6 out on a motion to dismiss. They have to make a good
7 faith investigation before they file their complaint; it
8 can't coming afterwards. Thank you, Your Honor.

9 THE COURT: Okay, thank you.

10 All right. I'm going to rule on the motion to
11 dismiss at this point. In doing that, I have to take the
12 allegations of the claimant as true, draw all reasonable
13 inferences in favor of the plaintiff and decide, looking
14 at the complaint in that light, whether it states a
15 plausible claim for relief.

16 And I'm going to deny the motion in substantial
17 part. I'm going to grant it with respect to the unjust
18 enrichment claim.

19 The complaint should be amended within 45 days
20 to add a Connecticut plaintiff, to allege an exemption to
21 the requirement under 93(a) that there be a pre-suit
22 notice, and make any other adjustments that the plaintiff
23 chooses to make.

24 But the, the unjust enrichment claim fails
25 because -- and I'm granting the motion without prejudice

1 to any, to a revision of the complaint in the event that
2 there's ever a holding that the contract is illusory.
3 That's such an unlikely prospect that there's no reason to
4 think it's ever going to happen and, therefore, I think
5 the law is, is on the defense side on this one.

6 There is a contract. It's going to be either
7 enforced or not, fair or not, violative of unfair trade
8 practice law or not, but it seems very unlikely that it's
9 going to be held to be an illusory contract and,
10 therefore, the unjust enrichment claim, I think, fails.

11 The other arguments made in the motion to
12 dismiss I think are without merit at this point.

13 The two kind of winning technical arguments
14 would be resolved by the amendment, forthcoming amendment
15 of the complaint and the other arguments fail.

16 I think there is a valid claim stated here for
17 for an unfair trade practices violation. The sheet
18 indicates, quote, "Your rate may fluctuate month to month
19 based on wholesale market conditions," quote/unquote.
20 That I think gives rise to a reasonable understanding in
21 the ordinary consumer that the price that the consumers
22 charged for electric supply will in fact be based upon the
23 wholesale market rate for electricity.

24 And it may turn out that the claim lacks merit,
25 but I think it survives a motion to dismiss. That will be

1 true under either the Connecticut or the Massachusetts
2 statutes.

3 There is, I think, each of the, each of the
4 elements of a unfair trade practices claim has been
5 properly stated in the complaint. The complaint does not
6 fail Rule 9(b), even to the extent that it pleads a
7 fraudulent inducement claim. As I noted, the exact
8 document alleged to have fraudulently induced the named
9 plaintiff has been attached to the opposition brief. That
10 terms and condition sheet had to be provided to the
11 plaintiff before she entered into her contract, and it has
12 language that arguably fraudulently reduced her into
13 entering into the contract.

14 So, I think 9(b) has been satisfied by the fact
15 that everybody knows the precise statement in the exact
16 form it was made and the fact it had to have been made by
17 law to the plaintiff before she entered into the contract
18 with Viridian. The date of that contract is well known to
19 both sides and need not be, in my view, expressly stated
20 in the complaint.

21 The Covenant of Good Faith and Fair Dealing I
22 think survives the motion to dismiss. I think that the
23 principal attack on that claim is that there's not
24 sufficient allegations of bad faith here. I disagree. I
25 think, read as a whole and taken in the light most

1 favorable to the plaintiff, the complaint does allege bad
2 faith on the part of Viridian with respect to the
3 establishment of electric supply rates that are a multiple
4 of the wholesale price that's prevailing in the market,
5 and that seems to be at least potentially done in bad
6 faith, i.e., in an effort to price-gouge.

7 I don't think that it's possible to argue that
8 price gouging is not something that's done in bad faith
9 and if this price gouging complaint survives summary
10 judgment and trial, then I think there's no doubt that
11 that would be, that would satisfy the bad faith
12 requirement.

13 Mr. Blynn, I don't know if there's other
14 arguments that I haven't touched upon?

15 MR. BLYNN: No, Your Honor.

16 THE COURT: Okay. I don't intend to write.
17 Does anybody want me to further explain the ruling at this
18 time?

19 MR. IZARD: No, Your Honor.

20 MR. BLYNN: No, Your Honor.

21 THE COURT: All right. Mr. Izard, we're going
22 to get a new complaint within the next -- how many days?

23 MR. IZARD: Say 15?

24 THE COURT: That's fine. Okay. Is there
25 anything we can do to, any issues we can take up as long

1 as we're all in the same room? Deadlines, discovery?

2 MR. IZARD: Well, Your Honor, there's one issue
3 on the 26(f) report where the Court approved the 26(f)
4 report but there is a -- the plaintiffs and defendants
5 have different positions on the class certification issue.
6 Plaintiffs propose that they file their brief 30 days
7 following the close of expert discovery, and I think the
8 defendant wanted to bifurcate and so we just need to
9 clarify at some point whether that will work.

10 And the second is we had received an email from
11 the Clerk, I don't know if the Court's been following the
12 issue of offers of judgment and how that relates to class
13 actions, but there's some authority around the country
14 that the filing of an offer of judgment can moot a class
15 action if it's served before the motion or class
16 certification is filed.

17 THE COURT: Yes, I've rejected that in a number
18 of cases.

19 MR. IZARD: Okay. So, we had filed a motion for
20 class certification just to deal with that issue. What we
21 have proposed is we do the briefing once we have the 26(f)
22 schedule in place, and I don't get a sense that the
23 defendant has an issue with that, so I just wanted to
24 raise that with the Court, and at some point I think we
25 probably should nail down the schedule of when our class

1 cert motion would be due. As I say, our proposal is 30
2 days after expert discovery, defendants want
3 bifurcation -- fact expert discovery.

4 THE COURT: All right. I'm not sure I
5 understand what the defendant's proposal is. Bifurcate
6 meaning you want the class cert motion filed after fact
7 discovery?

8 MR. BLYNN: Your Honor, that was filed by, by
9 predecessor counsel. I need to find out exactly what
10 their intention was.

11 THE COURT: All right, let me suggest this. I
12 think that -- is the motion for class cert that you filed
13 as a protective matter still pending?

14 MR. IZARD: Yes.

15 THE COURT: I'm inclined to deny that as moot --
16 or not as moot but without prejudice. You're going to add
17 a plaintiff. I mean there ought to be, the motion ought
18 to reflect the reality of the case.

19 MR. IZARD: Sure.

20 THE COURT: As I said before, I rejected this
21 idea that comes out of the 7th Circuit that you can moot a
22 case by filing a, by a class action by filing an offer of
23 judgment to the individual plaintiff. I don't think that
24 makes a lot sense frankly. And so there's no need to file
25 a protective motion for class certification. We ought to

1 do it on whatever schedule makes sense for the case.

2 And in the first instant, why don't you go back
3 and renegotiate what makes sense. I've had class motions
4 early, I've had them late. I think in general the class
5 cert motion should come as early in the case as possible,
6 because I do think it affects the scope of discovery and
7 potentially the scope or the nature of your settlement
8 discussions.

9 MR. IZARD: Our concern is the whole Walmart,
10 Comcast issue, how much -- what kind of factual support do
11 you need. You know, years ago, it's a little more
12 streamlined than it is now, so that was done --

13 THE COURT: No, you're entitled to some class
14 discovery, if that's the concern. You can have some class
15 discovery, absolutely. But you ought to get the class
16 discovery done as quickly as possible, even if, in fact,
17 expert discovery is continuing at the same time.

18 MR. IZARD: And we may have an expert on damages
19 to deal with Comcast, for purposes of class cert.

20 THE COURT: That's fine. Again, why don't you
21 two discuss that in the first instances and submit a
22 proposal if you can agree. If you can't, then I'll
23 resolve it.

24 MR. BLYNN: Just a practical concern, you said
25 15 days? Might want to take 30?

1 MR. IZARD: Thirty is fine. Okay.

2 MR. BLYNN: I think whatever MCPA requires,
3 that --

4 MR. IZARD: Well, we'll talk about that.
5 Complaint in 30 days then.

6 THE COURT: All right, that's fine.

7 Anything else?

8 MR. BLYNN: No, Your Honor.

9 THE COURT: All right, thank you all. We'll
10 stand in recess.

11 (Whereupon the above matter was adjourned at 1:15
12 o'clock, p. m.)
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C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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